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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PAUL ALLEN JOHNSON, Defendant and Appellant.	F075561 (Super. Ct. No. F12901158) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Timothy A. Kams, Judge.

Matthew A. Siroka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Paul E. O'Connor, and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Paul Allen Johnson appeals the judgment of his conviction of second degree murder. He contends the trial court erroneously allowed him to withdraw his plea

of not guilty by reason of insanity. He also contends the trial court erred by declining to strike a strike prior conviction pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 25, 2012, at approximately 3:30 a.m., a man out looking for recycling found the body of Arthur McKown in an alley. The man called 911, and the Fresno Police Department responded to the scene. McKown had approximately 39 stab wounds to his body. The cause of death was the perforation of the right common carotid artery and right external jugular vein due to multiple stab wounds to the neck. There was an empty Canadian Mist bottle and an empty Olde English bottle next to the body.

Detective Jennifer Federico of the Fresno Police Department examined surveillance footage from a McDonald's located near the scene. The footage showed McKown enter the McDonald's around 7:00 p.m. on January 24, 2012. As McKown was about to leave, a man later identified as appellant went into the restaurant and spoke to McKown, and they left together. Federico also examined surveillance footage from a liquor store located near the scene. The liquor store footage showed McKown and appellant enter the store on January 24, 2012. McKown bought two bottles of Olde English, and appellant bought a bottle of Canadian Mist. A police video camera captured appellant and McKown walking toward the direction where McKown's body was eventually found. An unidentified third individual appeared to be talking to appellant in this video footage.

While Federico was driving near the scene later on January 25, 2012, she saw a man walking that she recognized from the video to be appellant. Detective Federico and her partner got out of their vehicles and started approaching appellant, who was near some dumpsters. Appellant started running toward them, so they drew their guns and ordered him to stop and put his hands up. They detained appellant, and upon searching him, found a pocket knife inside one of his pockets. They also found a box of knives

near the dumpsters. An arresting officer smelled a strong odor of bleach emanating from appellant.

Federico interviewed appellant's mother, Helen Johnson, whom appellant lived with. Johnson told Federico appellant came home at around 6:30 p.m. on January 24, 2012. She heard him get up but was not sure at the time if he went out. Johnson heard appellant doing laundry and taking a shower at approximately 4:00 a.m. Neither occurrence was unusual. Johnson told Federico that appellant had quite a few sharp knives because he liked to collect them. She said appellant was drunk when he got home on the 24th. Johnson recognized McKown as someone who would stop by and talk to appellant.

The police conducted a search of appellant's home. They located a pair of jeans and blue flannel shirt in the laundry room consistent with what appellant was wearing in the surveillance footage. A criminalist testified the clothing appeared to have discoloration consistent with bleach stains. The criminalist also testified that when bleach is used to clean, it can "degrade [DNA] to the point that it's not detectable."

The box of knives found near the dumpsters had appellant's fingerprints on it. Two of the knives from the box had bloodstains on them. McKown and appellant were eliminated as contributors of the blood on one of the knives, and appellant's blood type was found on the other. McKown's blood was found on a pair of headphones appellant was wearing on the night of the incident. Appellant's left boot had bloodstains on the upper outside portion and bottom of the boot. The blood on the upper outside portion of the boot was appellant's blood, but neither appellant nor McKown were contributors to the stain on the bottom of the boot. A plastic wrapper found in appellant's laundry room had McKown's blood on it.

A jury convicted appellant of second degree murder and found true that appellant personally used a weapon in the commission of the offense. In a bifurcated proceeding, appellant admitted he had suffered a prior strike conviction. Appellant was sentenced to

a term of 15 years to life with the possibility of parole, doubled pursuant to Penal Code[1] section 667, subdivision (e)(1), plus one year for the weapon enhancement.

DISCUSSION

I. Withdrawal of Insanity Plea

A. *Relevant Background*

On May 31, 2012, defense counsel requested appellant's competency be evaluated pursuant to section 1368.[2] The court appointed Harold L. Seymour, Ph.D., to examine appellant. In Seymour's report, dated June 12, 2012, he recommended the court find appellant competent to stand trial. On August 9, 2012, the court adopted the recommendation in the report and found appellant competent to stand trial.

On January 8, 2013, defense counsel declared doubt as to appellant's competency. Defense counsel informed the court that although appellant had been previously competent, his condition had worsened, and he was unable to cooperate with counsel. Defense counsel represented that appellant had expressed the belief that all white men shared the same DNA, the victim was his biological brother, and they had extraterrestrial origins. Because there was DNA evidence against appellant, appellant's belief hindered defense counsel's ability to discuss the evidence with appellant. The court appointed Howard B. Terrell, M.D., to conduct another competency evaluation. In his report, dated February 1, 2013, Terrell noted appellant came across as slightly paranoid and became more bizarre and paranoid as the interview went on. Appellant reported to Terrell that

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[1] All further statutory references are to the Penal Code.

[2] Section 1368 provides in pertinent part: "(a) If, during the pendency of an action … a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent…. [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing."

"Blacks" were kidnapping women, raping them, and dropping them off at the college to make them look like normal women. Appellant reported that people were trying to discover him doing something wrong and trying to make him look "awkward." Appellant told Terrell defense counsel was trying to buy his house, and Terrell reported he spoke "with a paranoid theme and started talking in a rapid, non-stop, continuous manner towards the end of the interview." Terrell opined appellant had a psychotic disorder. Terrell recommended the court find appellant mentally incompetent to stand trial.

On February 14, 2013, the People requested the court order another competency examination. The court appointed Luis H. Velosa, M.D. In Velosa's report, dated February 19, 2013, he reported appellant was quite distraught and anxious during the interview. He opined appellant's thinking process was impaired. Velosa opined appellant suffered from psychosis with a recommendation to rule out schizoaffective disorder. Velosa recommended the trial court find appellant not competent to stand trial. On March 14, 2013, the trial court found appellant not competent to stand trial and ordered involuntary antipsychotic medication.

On April 11, 2013, the court committed appellant to the trial competency program at Atascadero State Hospital. He was admitted to the hospital on June 5, 2013. Appellant regained competency, and the court reinstated the criminal proceedings on October 7, 2013. In the report accompanying the certification of mental competency, Courtney Carman, Psy.D., and David K. Fennell, M.D., E.J.D., noted appellant reported he would like to plead not guilty, insisting he did not commit the crime. Their report stated, "Although [appellant] seemed inflexible in his approach to his charge, there was no evidence of paranoia or delusions driving this." At the time of the writing of this report, appellant expressed no delusional theories about real estate schemes or conspiracies against him as he had in the past.

On January 16, 2014, appellant entered a not guilty by reason of insanity (NGI) plea in addition to his not guilty plea. The court appointed Drs. Terrell and Velosa to evaluate appellant's sanity at the time of the offense pursuant to section 1027.[3] Terrell evaluated appellant on February 1, 2014. Terrell indicated that because appellant was adamant he did not commit the crime, Terrell had no credible evidence to show appellant did not understand the nature or wrongfulness of his actions. Terrell recommended the court find appellant sane at the time of the homicide.

Velosa evaluated appellant on February 7, 2014. Velosa opined that, at the time of the evaluation, appellant was free from any type of psychiatric symptoms which may impair his concept of reality. Velosa diagnosed appellant with a psychiatric disorder best classified as schizophrenia—paranoid type—in remission. Velosa expressly did not opine as to whether or not appellant was legally sane at the time of the homicide because appellant informed him he was planning to withdraw his insanity defense and plead not guilty.

On February 20, 2014, the court stated it should not have appointed Drs. Terrell or Velosa because both doctors had previously performed section 1368 evaluations on appellant. Defense counsel informed the court appellant wanted to withdraw his insanity plea and not talk to any more doctors. Defense counsel represented to the court, "I feel strongly that [withdrawing appellant's insanity plea is] a terrible decision. I think that's the proper defense for this case. [¶] … [¶] I am not just on the fence about this. I mean, I really am convinced that this is the way to go. But I understand I am not in the driver's seat." Defense counsel informed the court that Velosa suggested to her that appellant's competency be evaluated. The matter was put over a week so that defense counsel could

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[3] Section 1027, subdivision (a) provides in pertinent part: "When a defendant pleads not guilty by reason of insanity the court shall select and appoint two, and may select and appoint three, psychiatrists, or licensed psychologists … to examine the defendant and investigate his or her mental status."

explain to appellant the consequences of withdrawing his NGI plea and speak to Velosa. Appellant told the court he was not guilty, so he did not see how withdrawing the plea would have any effect on the outcome. The court informed appellant if he is found not guilty in the guilt phase, there would not be a sanity phase of the trial. The court encouraged appellant to talk to his attorney.

On February 27, 2014, defense counsel informed the court appellant would not be withdrawing his dual plea because appellant understands he will have the opportunity to present a defense during the guilt phase of the trial. The court asked defense counsel whether she was able to discuss Velosa's previous comment regarding appellant's competency with him and noted that Velosa appeared to find appellant competent in his latest written report. Defense counsel responded, "No, I spent time with him. I think we are as good as we're going to get and he will move forward." Defense counsel confirmed she was not asking for an appointment regarding competency. The court appointed Paula Willis, Ph.D., and Richard Kendall, Psy.D., to conduct section 1027 examinations.

Willis examined appellant on March 12, 2014. Appellant reported to Willis that he met with McKown the night of McKown's death. Appellant told Willis he did wash blood out of his clothes and he knew how the blood got there but was not going to say. He told Willis he did not kill McKown; two black men did. Willis opined that appellant had a "severe clinical thought disorder." Willis noted appellant experiences paranoid delusions when not medication compliant. She believed his thoughts of what happened the night of McKown's death were not reality based. She opined that appellant did not know or understand the nature and quality of his acts and was not able to distinguish right from wrong at the time of the alleged crimes.

Kendall examined appellant on April 8, 2014. Kendall reported a more detailed account of the events of the night of the incident than did Willis. Appellant reported to Kendall that "two black guys stabbed" McKown. Appellant said he was sitting with McKown drinking and the "black guys" approached. One went for McKown's shopping

cart, and one went for him. Appellant watched them do it and then left the scene. Appellant first denied washing his clothes but then admitted that he did because he "got stabbed by the black guys too." Appellant said he got a lot of McKown's blood on him. Kendall asked appellant where was he stabbed by the assailants, and appellant admitted they did not stab him. He stated he was not insane then or now. He said, "Look, I was drunk that night." Kendall opined appellant suffered from schizoaffective disorder. Kendall stated there was no evidence that appellant was not able to understand the nature and quality of his actions at the time of his offense because he was clearly aware McKown was stabbed multiple times and died as a result. Appellant also noted he was drunk at the time of the offense. Kendall opined appellant was capable of distinguishing right from wrong at the time of the commission of the offense because appellant fled the scene of the crime and attempted to avoid detection by washing his clothes with bleach to mask the blood stains of the victim.

On February 26, 2015, defense counsel asked the court to appoint Dr. Terrell to interview appellant for a section 1027 examination, as Terrell had previously indicated he would allow her to be present. Terrell interviewed appellant on March 7, 2015, in the presence of defense counsel. Appellant gave a similar account to Terrell that he gave to Kendall. Terrell recommended the court find appellant legally sane at the time of the alleged crime.

On May 14, 2015, defense counsel informed the court the defense had "chang[ed their] posture" on whether appellant would be pleading not guilty by reason of insanity based on the recent reports. Defense counsel stated:

> "[Terrell's] basis for stating that [appellant] was sane at the time that the crime was committed is because he won't admit that he committed the crime and … the defense's position is that his paranoia has created a world in which he truly believes that these figures are responsible for things but because of the way that the questions—I actually was present when … Terrell did the second interview out of curiosity to see how these take place and considering how important they are, they're really rather short and I

> was rather disappointed but it is what it is so at this point we're withdrawing our not guilty by reason of insanity and just having a not guilty so we will have one trial, a guilt phase trial only."

Defense counsel told the court she spoke to appellant and explained her "strategic dilemma." She stated his position has always been that he did not commit the crime, so he is "very comfortable with just having a guilty phase trial." The court then called a short recess so that it could "grab some material on revoking or withdrawing an NGI plea." When back on the record, the court said:

> "My reading of the law, [defense counsel] is [appellant] has to personally enter an NGI plea and he also has to also personally agree to withdraw that plea. So … I'm required—[appellant], I'm not trying to give you a hint about what you should or shouldn't do but I want to make sure you understand the consequences of withdrawing a not guilty by reason of insanity plea. Currently you have entered a plea of not guilty by reason of insanity and I believe you were told at the time you entered that plea that if you were found not guilty by reason of insanity, you could be committed to a hospital for the rest of your life on that not guilty by reason of insanity plea. [D]o you understand that?"

Appellant responded that he did. The court went on: "If you withdraw this not guilty by reason of insanity plea today and you're convicted of the charge, you won't be going to a hospital, you'll be going to State Prison. Do you understand that?" Appellant responded that he did. The court then said, "And either party want [appellant] advised of any other direct or indirect consequences of the withdrawal of a not guilty by reason of insanity plea …?" Defense counsel responded,

> "No and I did go and speak to him, actually I stayed, I did two times that I spent time with him on this issue, I stayed after Dr. Terrell did the interview assessment and we spoke because it was clear to me what his opinion was going to be and then after … I got it in writing, I went and spoke to [appellant] again about what I thought he should do strategically so we've spoken twice and both times I've asked him if he had any questions and all along, he, you know, stated he wasn't responsible and he wants to go forward with the not guilty."

The court again asked appellant if he understood the consequences of withdrawing the not guilty by reason of insanity plea. Appellant responded that he did and wished to withdraw the plea. Counsel told the court she concurred with the withdrawal of the plea. The court asked defense counsel, "You're not happy with the evaluation by Dr. Terrell?" Defense counsel responded: "No because I think it's short sighted but I'm not the Medical Doctor and I think there should be some allowance for someone being so ill that—I don't think they should have to give an admission to be considered, you know, insane at the time of the crime, it seems—I just—I think it's more complex than that but I'm stuck with what I have to work with here and I think what we have, it would be wiser for us to go forward with just a guilt phase. The court then allowed appellant to withdraw his insanity plea.

B. *Analysis*

Appellant argues his due process rights were violated because the trial court did not do enough to insure his withdrawal of his insanity plea was knowing, intelligent, and voluntary. Specifically, appellant contends the trial court had a duty to obtain waivers of his "right to a jury trial on the issue of sanity or any of the rights he was giving up by withdrawing the insanity plea." Accordingly, he argues, the matter should be remanded for a sanity trial or appellant's demonstration of competence to withdraw his insanity plea. We disagree.

A defendant may withdraw an insanity plea at any time before trial of that issue. (*People v. Love* (1937) 21 Cal.App.2d 623, 626.) "[N]either the trial court nor defense counsel can compel a competent defendant to present an insanity defense, no matter how strong the available evidence of the defendant's insanity at the time of the charged acts." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1222.)

The procedure for accepting a withdrawal of a not guilty by reason of insanity plea is set forth in *People v. Redmond* (1971) 16 Cal.App.3d 931:

> "(1) The trial court should reassure itself that a defendant at the time he seeks to withdraw his insanity plea is presently sane, i.e., that he is capable of understanding the nature and purpose of the proceedings against him, that he comprehends his own status and condition with reference to such proceedings, and that he is able to assist his attorney in the conduct of his defense. ([] §§ 1367-1368; [citations].) (2) If defendant is found to be presently insane, the solution is obvious. ([] §§ 1370, 1367.) (3) If defendant is found to be presently sane, then a series of questions should be propounded to such defendant and to his counsel and the answers thereto be made of record to meet requirements of *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1970) 1 Cal.3d 122, [citation]; and *People v. West* (1970) 3 Cal.3d 595, *insofar as they might be applicable to the situation* presented. (4) If the court be satisfied that such defendant is making a free and voluntary choice with adequate comprehension of the consequences, then withdrawal of the plea should be permitted." (*People v. Redmond, supra*, 16 Cal.App.3d at pp. 938–939, italics added.)

"In the absence of doubt about a defendant's competence, a trial court has no sua sponte duty to inquire further into the reasoning behind the defendant's decision." (*People v. Gamache* (2010) 48 Cal.4th 347, 377.)

The trial court followed the above procedure in the present case. To the extent appellant is arguing the court erred by not ordering a competency hearing, his argument has no merit. "When a competency hearing has already been held and the defendant has been found to be competent to stand trial, 'a trial court is not required to conduct [another] competency hearing unless "it 'is presented with a substantial change of circumstances or with new evidence' " that gives rise to a "serious doubt" about the validity of the competency finding.' " (*People v. Kaplan* (2007) 149 Cal.App.4th 372, 383–384.) Here, appellant's request to withdraw his insanity plea was consistent with his position toward the case for many months. The request does not constitute evidence that would require further competency examinations. Little had changed since defense counsel had informed the trial court that there were no issues that needed to be raised with regard to appellant's competence on February 27, 2014. The record supports the trial court was satisfied as to appellant's present competency.

Finding appellant presently competent, the trial court made an adequate inquiry under the circumstances as to whether appellant was making a free and voluntary choice with adequate comprehension of the consequences. The trial court inquired about and considered defense counsel's concerns regarding Terrell's report. This discussion informed the trial court of appellant and defense counsel's justification for withdrawing the plea. In addition to appellant's strong conviction that he did not commit the crime, defense counsel explained the plea was being withdrawn in light of the strength of the insanity evidence. Though defense counsel expressed concern that Terrell concluded appellant was sane simply because he did not admit guilt, there was strong evidence on the record that would undermine the defense's insanity case. Two of the three evaluators had deemed appellant sane at the time of the offense. Kendall pointed to facts beyond appellant's insistence of innocence, to support his conclusion appellant was sane at the time of the offense. These facts included appellant's ability to account what happened the night of the incident, including noting he was drunk, and that appellant fled the scene and washed his clothes of McKown's blood. The Atascadero State Hospital staff noted appellant continued to insist he was innocent after his other paranoid and delusional thoughts had subsided. This insistence of innocence was noted by the Atascadero staff as not being driven by "paranoia or delusions."

Moreover, the trial court advised appellant that a consequence of withdrawing his plea was that if he was convicted he would not be going to a hospital but to prison. Defense counsel advised the court she had recently spoken to appellant twice about trial strategy and gave him opportunities to ask questions. The court confirmed with appellant that he understood the consequences of withdrawing the insanity plea, and appellant said he did. Counsel concurred with the decision to withdraw the plea and declined further advisements from the court. As we have stated, even in the face of overwhelming insanity evidence, the court cannot compel a presently competent defendant to present an insanity defense. (See *People v. Bloom*, *supra*, 48 Cal.3d at p. 1222.)

We do not find any further advisements would have been necessary, and appellant is vague as to what other inquiries or advisements were required. Appellant suggests *Boykin-Tahl* advisements should have been given. *Boykin-Tahl* rights refer to a criminal defendant's constitutional privilege against compulsory self-incrimination, right to a jury trial, and right to confront his or her accusers. (*Boykin v. Alabama*, *supra*, 395 U.S. at p. 243.) Each of these three rights "must be specifically and expressly enumerated for the benefit of and waived by the accused *prior* to acceptance of his [or her] *guilty plea*." (*In re Tahl, supra,* 1 Cal.3d at p. 132, italics added.) *Boykin-Tahl* advisements are also required to be given before a trial court accepts a defendant's plea that is tantamount to a guilty plea; for example, entering a solitary plea of not guilty by reason of insanity. (See *People v. Weaver* (2001) 26 Cal.4th 876, 964.)

Appellant contends that under the circumstances of the present case, his withdrawal of his not guilty by reason of insanity plea was tantamount to a guilty plea because of the strength of evidence of culpability. We disagree. The evidence against appellant was circumstantial, and appellant was able to advance his defense that he did not commit the crime. Defense counsel made several arguments in her closing argument disputing that the People had proven the elements beyond a reasonable doubt. Even if we were to consider appellant's withdrawal as tantamount to a guilty plea, it is not clear which of the *Boykin-Tahl* rights appellant is contending he was waiving by way of the withdrawal of his plea. It has been held that in the context of a withdrawal of a plea, advisement of the waiving of the privilege against self-incrimination need not be given. (*People v. Huffman* (1977) 71 Cal.App.3d 63.)[4] As for appellant's *constitutional* right to

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[4] "The inquiry by the court satisfied all the dictates of *In re Tahl*, [*supra*,] 1 Cal.3d 122, except that the defendant was not informed of the privilege against self-incrimination. Such inquiry is not called for under these circumstances. When one pleads guilty, one abandons the right to trial by jury, confrontation and also waives his privilege against self-incrimination. The withdrawal of a plea, however, involves the first two rights but has nothing whatsoever to do with self-incrimination. The defendant was

a jury trial and right to confront his accusers, he was afforded those rights during the guilt phase of his trial. Under the circumstances of the present case, there were no *Boykin-Tahl* advisements that would have been appropriate to give.

We do not agree with appellant's assertion that because there was disagreement as to appellant's sanity at the time of the offense, the trial court was required to give *Boykin-Tahl* advisements. Appellant relies on a quote from *People v. Gamache*, *supra*, 48 Cal.4th at page 376 to support this assertion: "If the trial court has no doubt about a defendant's present competence, and if the experts who have examined the defendant are unanimous in finding him or her sane at the time of the crime, a trial court may freely accept a defendant's withdrawal of an insanity plea." This being true does not also mean that disagreement between experts regarding a defendant's sanity at the time of the crime somehow triggers the court to give *Boykin-Tahl* advisements. Appellant does not cite any case law, nor can we find any, which directly supports his proposition. As we have discussed, the *Boykin-Tahl* advisements would have been inappropriate under the circumstances of the present case. Thus, we cannot find the court erred by not giving them.

We also disagree with appellant's suggestion that because appellant had been previously found incompetent, there was "doubt" as to his present competence. "Doubt" in this context is a term of art, which requires the court to order further proceedings. (§ 1368.) Because the trial court did not order any proceedings pursuant to section 1368, it clearly had no doubt with regard to appellant's present competence. And, as we have discussed, the trial court committed no error by not ordering further competency proceedings. We find the trial court made an adequate inquiry into whether appellant was making a knowing and voluntary withdrawal of his insanity plea.

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not requested to speak at all by reason of the withdrawal of this plea. The advisements given were adequate." (*People v. Huffman, supra*, 71 Cal.App.3d at p. 81.)

Respondent is correct that the right to a jury sanity trial and the right to cross-examine witnesses therein are *statutory* rights, not constitutional rights. (See §§ 1026, 1027.) Appellant has not cited, nor have we found, any case authority which requires us to find express waivers of those rights on the record, as is required for *Boykin-Tahl* rights. We can infer from the record that appellant's trial counsel explained that his insanity plea would have afforded him a jury trial and a right to cross-examine witnesses and that by withdrawing his plea, he was foregoing those rights.

Even if we were to assume the trial court erred by not obtaining express waivers of certain rights from appellant, any error was harmless. Because the rights appellant was giving up were statutory, rather than constitutional, and appellant has not met his burden of showing appellant's due process rights were violated, the standard of harmlessness is not the more stringent *Chapman*[5] standard as appellant suggests, but any error in advisements the court made must be measured by the *Watson*[6] standard: whether it is reasonably probable the outcome would have been more favorable to appellant absent the error. To the extent the trial court made any error by failing to advise appellant of his right to a sanity trial by jury, there is no reasonable probability the outcome would have been different absent the error. Appellant was adamant he did not commit the crime and did not want to advance any evidence as to his mental state. There is no doubt in our mind that advisements of his right to a jury trial and right to cross-examine witnesses would not have made any difference based on this record. It is clear from the record appellant knew he could have a jury trial on insanity and that if he withdrew his plea, that trial would not occur. It can be inferred from the record that counsel went over the consequences of withdrawing the plea with him thoroughly. Finally, appellant's decision

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5 *Chapman v. California* (1967) 386 U.S. 18.

6 *People v. Watson* (1956) 46 Cal.2d 818.

not to advance any mental health evidence at trial is further evidence that the advisements would not have made a difference.

II. Denial of Appellant's *Romero* Motion

Section 1385 gives the trial court authority to order an action dismissed, "in furtherance of justice." (§ 1385, subd. (a).) Under this authority, the court may vacate a prior strike conviction for purposes of sentencing under the "Three Strikes" law, "subject, however, to strict compliance with the provisions of section 1385." (*Romero, supra,* 13 Cal.4th at p. 504.)

Appellant moved the trial court pursuant to *Romero* to strike his prior 2001 conviction for criminal threats. Appellant argued the criminal threats conviction was due to mental illness. The criminal threats conviction arose from an incident where he threatened his ex-partner with whom he shares a daughter that he would take their daughter and kill her. When appellant's ex-partner's husband told appellant to stop calling their home, appellant said, "[i]f I ever catch you hurting her, I'll kill you." The probation report for that offense noted that the "Jail Expansion" team suggested appellant needed a conservatorship.

The defense also presented testimony from appellant's sister regarding appellant's history with mental health. Appellant's sister testified that appellant had been diagnosed with paranoid schizophrenia. She testified that when appellant was on his medication he was pleasant to be around, and when he was not he was "not so much."

At sentencing, the trial court denied appellant's motion, stating:

> "I acknowledge defense arguments. They are compelling, but I think more compelling is [appellant's] long history of criminal behavior extended beyond the time that the strike occurred and up until the case before the Court. So although there are some grounds to grant this motion, I think on balance I am not persuaded that it would be in the interest of justice."

Appellant now contends the trial court abused its discretion in denying his *Romero* motion to strike his prior conviction. Our review of the decision to strike a prior

conviction is deferential; we use the abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) Dismissal of a strike is a departure from the sentencing norm. As such, in reviewing a *Romero* decision, we will not reverse for abuse of discretion unless the defendant shows the decision was "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra,* 33 Cal.4th at p. 377.) Reversal is justified where the trial court was unaware of its discretion to strike a prior strike or refused to do so, at least in part, for impermissible reasons. (*Id.* at p. 378.) Appellant has not met his burden of showing the trial court's decision was "so irrational or arbitrary that no reasonable person could agree with it."

In ruling on a *Romero* motion, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, the trial court considered the probation report, testimony from appellant's sister regarding his mental health issues, the intent and spirit of the law, and appellant's criminality. Despite its consideration of appellant's mental health problems, the court declined to exercise its discretion to strike the prior strike. The record supports the trial court's conclusion.

Appellant's criminal behavior started in 1985 and comprised of several drug, weapon, and vehicle related misdemeanors and three felonies. Appellant's felonies included arson to an inhabited structure in 2000, a violation of section 452, subdivision (b), and his strike conviction in 2001, a violation of section 422. The current offense involved great violence, as McKown was stabbed 39 times.

The probation report addressed appellant's lengthy history with mental illness. The report says appellant was first diagnosed with schizophrenia in the 1990's. He

"usually" took his prescribed medication, but there were times he did not. As of the writing of the probation report, appellant was taking psychotropic medication. He has been in approximately 20 psychiatric programs. In addition, appellant was in Kings View for approximately six months when he was 17 years old and Eucalyptus Program in Bakersfield for approximately one year in his 30's. Appellant had been hospitalized with regard to mental health issues on "20ish" previous occasions including 5150 holds. He had been committed to Atascadero State Hospital on three to four occasions for court. The probation officer commented, "While [appellant's] mental health issues have been noted, he has also been granted several attempts at remedying those issues with psychiatric programs, over the years. Despite all the services afforded, [appellant] is now before the Court for murder." Though appellant's history is peppered with Vehicle Code violations and misdemeanors, his criminal behavior, as a whole, had escalated in seriousness.

Appellant does not cite any authority—nor are we aware of any—that suggests a court should grant a *Romero* motion where the defendant makes a showing that mental illness played some role in his criminal history. In fact, in *People v. Carrasco* (2008) 163 Cal.App.4th 978 (*Carrasco*), where the defendant's *Romero* motion was based on the fact that he had " 'significant mental health history and issues' " and was "suffering from the effects of long-term drug use" (*id.* at p. 992), the Court of Appeal rejected the defendant's claim that "the [trial] court erroneously found it lacked authority to consider [his] mental condition as a factor" (*id.* at p. 993). In *Carrasco,* in denying the motion, the trial court commented that case law did not authorize consideration of the defendant's " 'mental state, his mental condition, the reasons why he wanted to do these things.' " (*Id.* at p. 993.) The appellate court explained, "The record reflects the trial court considered a wide range of appropriate factors in passing sentence, particularly the nature and circumstances of [the defendant's] present and past convictions." (*Ibid.*) Since the trial court had expressly considered the defendant's "background and character in ruling on

the motion," its remarks about his mental condition amounted to "an acknowledgement that the court could not give undue weight to an inherently speculative argument that defendant's mental state 'made him do it.' " (*Id.* at pp. 993–994.)

" '[W]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.' " (*Carmony, supra,* 33 Cal.4th at p. 378.)

Given appellant's criminal history, his inability to avoid criminal activity for a substantial period of time, and his violent behavior, the trial court was well within its discretion to find that appellant fell within the spirit of the Three Strikes law despite his mental health history. Appellant has not shown that the trial court's decision not to strike the prior felony conviction allegation was arbitrary or irrational. In our opinion, this is not an extraordinary case in which all reasonable people would agree that appellant falls outside the spirit of the Three Strikes law. (See *Carmony, supra,* 33 Cal.4th at p. 378.) Thus, we conclude the trial court did not abuse its discretion in declining to strike appellant's prior strike conviction.

III. Appellant's November 15, 2018 Request for Limited Remand To Allow Him to Apply for Mental Health Diversion Pursuant to Section 1001.36

On November 15, 2018, appellant filed a request for a limited remand to allow him to apply for mental health diversion pursuant to section 1001.36. On January 15, 2019, this court deferred ruling on appellant's request pending consideration of the appeal on its merits and to the extent appellant requested a remand prior to consideration of the appeal on its merits, denied the request. We now address his request.

Effective June 27, 2018, the Legislature added two new sections to the Penal Code (§§ 1001.35 & 1001.36) that authorize trial courts to grant "pretrial diversion" to defendants diagnosed with qualifying mental disorders. (See Stats. 2018, ch. 34, § 24.) Section 1001.36 gives trial courts the discretion to grant pretrial diversion if the court

finds: (1) a qualified mental health expert has recently diagnosed the defendant with a qualifying mental disorder; (2) the mental disorder was a significant factor in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (§ 1001.36, subd. (b)(1)(A)-(F).)

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subd. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

On September 30, 2018—about three months after enacting section 1001.36—the Legislature amended the statute (as relevant here) to eliminate diversion eligibility for defendants charged with certain offenses, including "murder or voluntary manslaughter." (§ 1001.36, subd. (b)(2)(A); Stats. 2018, ch. 1005, § 1.) This amendment took effect on January 1, 2019. (*Ibid*.)

Appellant argues the initially enacted version of section 1001.36 applies retroactively to him because it is ameliorative, citing *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted December 27, 2018, S252220 (finding the statutes retroactive), and urging us to apply the reasoning in *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (finding Proposition 57, which limited direct filing of juvenile cases in criminal court, applied retroactively). He further argues the subsequent amendment eliminating his eligibility cannot apply retroactively due to the ex post facto clauses of the state and federal Constitutions. We reject appellant's contention that the amendment

violates the prohibition against ex post facto laws. Because we reject this contention, we need not determine whether the statute otherwise applies retroactively.

The federal and California Constitutions prohibit the enactment of ex post facto laws. (U.S. Const., art. I, §§ 9, 10; Cal. Const., art. I, § 9.) "A statute violates the prohibition against ex post facto laws if it punishes as a crime an act that was innocent when done or increases the punishment for a crime after it is committed." (*People v. White* (2017) 2 Cal.5th 349, 360.) The ex post facto prohibition ensures that people are given "fair warning" of the punishment to which they may be subjected if they violate the law; they can rely on the meaning of the statute until it is explicitly changed. (*Weaver v. Graham* (1981) 450 U.S. 24, 28-29.)

When appellant committed his offense in 2012, the possibility of pretrial mental health diversion did not exist. The initial version of section 1001.36 was not enacted until almost six and a half years later in June 2018. Consequently, appellant could not have relied on the possibility of receiving pretrial mental health diversion when he committed his offense.

Moreover, the Legislature's amendment of section 1001.36 to eliminate eligibility for defendants charged with murder or voluntary manslaughter did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for the offense with which appellant was charged. (See *People v. White*, *supra*, 2 Cal.5th at p. 360.) Appellant was subject to the same punishment when he committed his offenses as he was after the Legislature narrowed the scope of defendants eligible for diversion. Thus, the amendment does not violate the ex post facto clauses of the state or federal Constitutions, and appellant is ineligible for mental health diversion.

DISPOSITION

The judgment is affirmed.

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DE SANTOS, J.

WE CONCUR:

_____
SMITH, Acting P.J.

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MEEHAN, J.